



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, 215, 234, 239, and 252

[Docket DARS-2016-0028]

RIN 0750-AJ01

Defense Federal Acquisition Regulation Supplement: Procurement of Commercial Items (DFARS Case 2016-D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2013 and 2016 relating to commercial item acquisitions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2016-D006, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2016-D006" under the heading "Enter keyword or ID" and

selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2016-D006." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2016-D006" on your attached document.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D006 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn:

Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060

Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571-372-6099.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement the requirements of sections 851 through 853 and 855 through 857 of the National Defense Authorization Act (NDAA) for Fiscal Year

(FY) 2016 (Pub. L. 114-92, enacted November 25, 2015), as well as the requirements of section 831 of the NDAA for FY 2013 (Pub. L. 112-239, enacted January 2, 2013). This rule also provides guidance to contracting officers to promote consistency and uniformity in the acquisition process.

On August 3, 2015, DoD published proposed DFARS rule 2013-D034 to implement the requirements of section 831 (80 FR 45918). Based on the comments received in response to that proposed rule, and in order to implement the requirements in sections 851 through 853 and 855 through 857 of the NDAA for FY 2016, DFARS rule 2013-D034 was closed into this proposed DFARS rule.

II. Discussion and Analysis

A. Proposed DFARS revisions

This rule proposes to amend the DFARS as follows:

1. Definitions of "market prices," "market research," "nontraditional defense contractor," "relevant sales data," and "uncertified cost data" are added.

2. DFARS 212.102, Applicability, is amended to instruct contracting officers on the treatment of prior commercial item determinations and nontraditional defense contractors.

3. DFARS 212.209, Determination of price reasonableness, is added to provide a hierarchy of data for contracting officers to consider when making determinations of price reasonableness.

4. DFARS subpart 212.72, Limitation on conversion of procurement from commercial acquisition procedures, is added.

5. DFARS 215.402, Pricing policy, is amended to provide information regarding the contracting officer's responsibility for determining if the information provided by the offeror is sufficient to determine price reasonableness.

6. DFARS 215.403-1, Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35), is amended to provide a reference to 212.102 regarding prior commercial item determinations.

7. DFARS 215.404-1, Proposal analysis techniques, is amended to supplement the proposal analysis procedures identified in the FAR.

8. DFARS 234.7002, Policy, is amended to incorporate the revisions in section 852 of the NDAA for FY 2016.

9. DFARS 239.101, Policy, is amended to incorporate the revisions in section 855 of the NDAA for FY 2016.

10. DFARS provisions 252.215-70XX, 252.215-70YY, and 252.215-70ZZ are added.

B. Analysis of public comments on proposed DFARS rule 2013-D034

Fourteen respondents submitted comments in response to proposed DFARS rule 2013-D034. The major issues identified by the respondents in response to DFARS rule 2013-D034 are addressed as follows under this proposed rule:

Comment: A number of the respondents stated that the rule is inconsistent with statute and Congressional intent, and DoD should wait for the NDAA for FY 2016.

Response: Proposed rule 2013-D034 was drafted to implement the statutory requirements from section 831 of the NDAA for FY 2013 to issue guidance and standards on the use of the commercial item acquisition authority under 10 U.S.C. 2306a and 2379. The rule was issued to solicit feedback on the language and direction of that rule. DoD has considered the comments received on proposed rule 2013-D034, as well as the revised statutory language from sections 851-853 and 855-857 of the NDAA for FY 2016, and has closed DFARS rule 2013-D034 into this proposed rule.

Comment: A number of respondents commented that proposed rule 2013-D034 would have a potential negative effect on research and development (R&D) and technology industries.

Response: This proposed rule implements the authority provided under section 857 of the NDAA for FY 2016 to treat supplies and services provided by nontraditional defense contractors as commercial items, which will expand opportunities for R&D and technology firms to do business with DoD.

Comment: A number of respondents asserted that proposed rule 2013-D034 would restrict what items qualify for commercial item determinations, and that the rule would eliminate "of a type"

and "newly offered for sale" from consideration for acquisition under commercial item procedures.

Response: The rule incorporates the requirements for commercial item determinations set forth under section 851 of the NDAA for FY 2016. Regulations for commercial item determinations for "items of a type" or "items newly offered for sale" are unchanged by this rule.

Comment. A number of respondents expressed concern that proposed rule 2013-D034 would exclude readily available data to determine commerciality.

Response: In accordance with section 831 of the NDAA for FY 2013, this rule will ensure that in cases in which uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations. Further, in accordance with section 855 of the NDAA for FY 2016, this rule directs that market research shall be used, where appropriate, to inform price reasonableness determinations. Additionally, DoD is establishing a cadre of experts to provide expert advice to the acquisition workforce in assisting with commercial item and price reasonableness determinations.

Comment: A number of respondents stated that proposed rule 2013-D034 required an offeror to obtain inappropriate

subcontractor data in order to make commerciality determinations and price reasonableness determinations.

Response: This proposed rule does not change the existing Federal Acquisition Regulation (FAR) requirement that offerors shall obtain from subcontractors whatever information is necessary to support a determination of price reasonableness. Further, this rule provides that no cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.

Comment: A number of respondents took exception to the definition of "market-based pricing" in proposed rule 2013-D034.

Response: The definition of market-based pricing in proposed DFARS rule 2013-D034 has not been retained in this proposed rule.

Comment: A number of respondents took exception to the treatment of modified commercial items and catalog items in proposed rule 2013-D034.

Response: This rule focuses on obtaining appropriate data for determinations of price reasonableness, and provides for the consideration of the same or similar items under comparable and differing terms and conditions, and catalog prices, when regularly maintained and supported by relevant sales data, to serve as the basis for price reasonableness determinations.

Comment: A number of respondents did not agree with the requirement for sales data to support a commerciality determination in proposed rule 2013-D034.

Response: This proposed rule does not address additional requirements for offerors to provide sales data to support a commerciality determination. This rule expands the use of FAR part 12 procedures. In accordance with section 853 of the NDAA for FY 2016, contracting officers may presume that a prior commercial item determination made by a military department, a Defense agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements. Further, in accordance with section 857 of the NDAA for FY 2016, supplies and services provided by nontraditional defense contractors may be treated as commercial items.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The objective of this proposed rule is to implement section 831 of the NDAA for FY 2013 (Pub. L. 112-239) and sections 851 through 853 and 855 through 857 of the NDAA for FY 2016 (Pub. L. 114-92). Sections 831, 851, and 853 address requirements related to commercial acquisitions. Specifically, section 831 provides guidance and training related to evaluation of price

reasonableness and requirements for requests for uncertified cost information for the purposes of evaluating price reasonableness. Section 851 provides that a contracting officer may presume that a prior DoD commercial item determination made by DoD shall serve as a determination for subsequent procurements of such items. Section 853 provides that a contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial items when establishing price reasonableness, subject to certain conditions.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT)

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for the Office of Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Determination

To implement section 831 of the NDAA for FY 2013 and sections 851 and 853 of the NDAA for FY 2016, DoD is proposing three new DFARS provisions: DFARS 252.215-70XX, Requirements for Certified

Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data; DFARS 252.215-70YY, Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor; and 252.215-70ZZ, Requirements for Submission of Proposals via Electronic Media.

DFARS 252.215-70XX allows for offerors to submit a written request for an exception from the requirement to submit certified cost or pricing data, by submitting specific information to support a commercial item exception or an exception based on prices set by law or regulation. DFARS 252.215-70YY and DFARS 252.215-70ZZ are only used in conjunction with DFARS 252.215-70XX and only specify when a proposal is required to be submitted to the administrative contracting officer or cost auditor or if submission of the cost portion is required via certain electronic media.

Given that section 831 of the NDAA for FY 2013 and sections 851 and 853 of the NDAA for FY 2016 were enacted to address requirements related to the treatment of commercial items and submission of uncertified cost or pricing data to support evaluations of price reasonableness for commercial items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items. An exception for contracts for the acquisition of commercial items,

including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law. DoD does not intend to make a determination to apply the requirements to acquisitions below the SAT.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et

seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide additional guidance concerning commercial item determinations and the appropriate amount and type of other than certified cost or pricing information that contracting officers must require an offeror to submit in order to determine whether proposed prices for commercial items are fair and reasonable.

The objective of this rule is to implement the requirements of sections 851 through 853 and 855 through 857 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92, enacted November 25, 2015), as well as the requirements of section 831 of the NDAA for FY 2013 (Pub. L. 112-239, enacted January 2, 2013).

According to data available in the Federal Procurement Data System for fiscal year 2015, DoD awarded 51,796 contracts to 21,073 unique vendors using commercial procedures. Of those contracts, 29,637 contracts (approximately 57%) were awarded to 14,286 unique small businesses (approximately 68%).

This proposed rule does not impose any reporting, recordkeeping, or other compliance requirements, because the rule does not add to or remove any of the existing requirements for the submission of other than certified cost or pricing data

for the purpose of determining the reasonableness of prices proposed for commercial items.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2016-D006), in correspondence.

VI. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 202, 212, 215, 234, 239, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 202, 212, 215, 234, 239, and 252 are proposed to be amended as follows:

1. The authority citation for parts 202, 212, 215, 234, 239, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

2. Amend section 202.101 by adding, in alphabetical order, the definition of "Uncertified cost data" to read as follows:

202.101 Definitions.

* * * * *

Uncertified cost data means the subset of "data other than certified cost or pricing data" (see FAR 2.101) that relates to cost.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Section 212.001 is added to read as follows:

212.001 Definitions. As used in this part—

Market research means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part. The review may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the FAR and shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market

capabilities (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction (10 U.S.C. 2302(9)).

4. Amend section 212.102 by—

- a. Adding a paragraph (a)(i) heading; and
- b. Adding paragraphs (a)(ii), (a)(iii), and (a)(iv).

The additions read as follows:

212.102 Applicability.

(a)(i) Commercial item determination. * * *

(ii) Follow the procedures at PGI 212.102(a) regarding file documentation.

(iii) Prior commercial item determination. This section implements 10 U.S.C. 2306a(b)(4).

(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item.

(B) If the contracting officer does not make the presumption described in paragraph (a)(iii)(A) of this section and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement.

(C) Not later than 30 days after receiving a request for review of a commercial item determination under paragraph (a)(iii)(B) of this section, the head of a contracting activity shall—

(1) Confirm that the prior determination was appropriate and still applicable; or

(2) Issue a revised determination with a written explanation of the basis for the revision (see 212.72).

(iv) Nontraditional defense contractors. Supplies and services provided by nontraditional defense contractors may be treated as commercial items (10 U.S.C. 2380A). This permissive authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of

supplies and services from business segments that meet the definition of "nontraditional defense contractor" even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not constitute a requirement for a commercial item determination and does not mean the item is commercial.

5. Section 212.209 is added to read as follows:

212.209 Determination of price reasonableness.

(a) Market research shall be used, where appropriate, to inform price reasonableness determinations.

(b) If the contracting officer determines that the information obtained through market research pursuant to paragraph (a) of this section, is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government or commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. The contracting officer shall consider the totality of other relevant factors

such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)).

(c) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

(1) Prices paid for the same or similar items sold under different terms and conditions;

(2) Prices paid for similar levels of work or effort on related products or services;

(3) Prices paid for alternative solutions or approaches; and

(4) Other relevant information that can serve as the basis for determining the reasonableness of price.

(d) Nothing in this section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement. If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information regarding the basis for price or

cost, including uncertified cost data such as labor costs, material costs, and other direct and indirect costs.

6. Amend section 212.301 by adding paragraph (f)(vi)(E) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(E) Use the provision 252.215-70XX, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, as prescribed at 215.408(6)(i) to comply with section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(1) Use the basic provision as prescribed at 215.408(6)(i)(A).

(2) Use the alternate I provision as prescribed at 215.408(6)(i)(B).

7. Add subpart 212.7X to read as follows:

Subpart 212.7X—Limitation on Conversion of Procurement from Commercial Acquisition Procedures

Sec.

212.7X00 Scope.
212.7X01 Procedures.

**Subpart 212.7X—Limitation on Conversion of Procurement from
Commercial Acquisition Procedures.**

212.7X00 Scope.

This subpart implements section 856 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

212.7X01 Procedures.

(a) Limitation. (1) For a procurement valued at more than \$1 million, but less than \$100 million, previously procured as a prime contract using FAR part 12 procedures based on a commercial item determination made by a military department, a defense agency, or another DoD component, prior to converting the procurement from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, the contracting officer for the procurement shall determine in writing that—

(i) The earlier use of commercial acquisition procedures under FAR part 12 was in error or based on inadequate information; and

(ii) DoD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.

(2) In the case of a procurement valued at more than \$100 million, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (a)(1) of this section until—

(i) The head of the contracting activity approves the determination made under paragraph (1) of this section; and

(ii) A copy of the determination so approved is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) In making a determination under paragraph (a) of this section, the determining official shall, at a minimum, consider the following factors:

(1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.

(2) The costs for DoD and the contractor in assessing and responding to data requests to support a conversion to noncommercial acquisition procedures.

(3) Changes in purchase quantities.

(4) Costs associated with potential procurement delays resulting from the conversion.

(c) The requirements of this subpart terminate November 25, 2020.

PART 215—CONTRACTING BY NEGOTIATION

8. Section 215.401 is added to read as follows:

215.401 Definitions.

As used in this subpart—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets or other adjustments).

9. Amend section 215.402 by—

- a. Adding paragraph (a)(i); and
- b. Redesignating the introductory text as paragraph (a)(ii).

The addition reads as follows:

215.402 Pricing policy.

(a)(i) Pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)—

(A) The contracting officer is responsible for determining if the information provided by the offeror is sufficient to determine price reasonableness. This responsibility includes determining whether information on the prices at which the same or similar items have previously been

sold is adequate for evaluating the reasonableness of price, and determining the extent of uncertified cost data that should be required in cases in which price information is not adequate;

(B) The contracting officer shall not limit the Government's ability to obtain any data that may be necessary to support a determination of fair and reasonable pricing by agreeing to contract terms that preclude obtaining necessary supporting information; and

(C) When obtaining uncertified cost data, the contracting officer shall require the offeror to provide the information in the form in which it is regularly maintained in the offeror's business operations.

* * * * *

10. Amend section 215.403-1 by adding paragraph (c)(3)(C) to read as follows:

215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(3) * * *

(C) When applying the commercial item exception under FAR 15.403-1(b)(3), see 212.102(a)(iii) regarding prior commercial item determinations.

* * * * *

11. Amend section 215.404-1 by-

- a. Redesignating paragraphs (1), (2), and (2)(i) through (iv) as paragraphs (a)(i), (a)(ii), and (a)(ii)(A) through (D), respectively;
- b. Adding a paragraph (a) heading; and
- c. Adding paragraph (b).

The additions read as follows:

215.404-1 Proposal analysis techniques.

(a) General.

* * * * *

(b) Price analysis for commercial and noncommercial items.

(i) In the absence of adequate price competition in response to the solicitation, pricing based on market prices is the preferred method to establish a fair and reasonable price.

(ii) If the contracting officer determines that the information obtained through market research is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government or commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. The contracting officer shall consider the totality

of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (section 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

(iii) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b)(ii) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

(A) Prices paid for the same or similar items sold under different terms and conditions;

(B) Prices paid for similar levels of work or effort on related products or services;

(C) Prices paid for alternative solutions or approaches; and

(D) Other relevant information that can serve as the basis for determining the reasonableness of price.

(iv) If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information, to include cost data. However, no cost data may be required in any case in which there are sufficient nongovernment sales of the same item to establish

reasonableness of price (section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)).

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors. For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (FAR 15.404-1(b)(2)(ii)(B)). Material differences are those that could reasonably be expected to influence the contracting officer's determination of price reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

(A) Market prices.

(B) Age of data. (1) Whether data is too old to be relevant depends on the industry (e.g., rapidly evolving technologies), product maturity (e.g., stable), economic factors (e.g., new sellers in the marketplace), and various other considerations.

(2) A pending sale may be relevant if, in the judgement of the contracting officer, it is probable at the anticipated price, and the sale could reasonably be expected to materially influence the contracting officer's determination of price reasonableness. The contracting officer may consult with

the cognizant ACOs as they may have information about future sales.

(C) Volume and completeness of transaction data. Data must include a sufficient number of transactions to represent the range of relevant sales to all types of customers. The data must also include key information, such as date, quantity sold, part number, part nomenclature, sales price, and customer. If the number of transactions is insufficient or the data is incomplete, the contracting officer shall request additional sales data to evaluate price reasonableness. If the contractor cannot provide sufficient sales data, the contracting officer shall request other relevant information.

(D) Nature of transactions. The nature of a sales transaction includes the information necessary to understand the transaction, such as terms and conditions, date, quantity sold, sale price, unique requirements, the type of customer (government, distributor, retail end-user, etc.), and related agreements. It also includes warranties, key product technical specifications, maintenance agreements, and preferred customer rewards.

(vi) The contracting officer shall consider catalog prices to be reliable when they are regularly maintained and supported by relevant sales data (including any related discounts, refunds, rebates, offsets, or other adjustments).

The contracting officer may request that the offeror support differences between the proposed price(s), catalog price(s), and relevant sales data.

(vii) The contracting officer may consult with the DoD cadre of experts who are available to provide expert advice to the acquisition workforce in assisting with commercial item and price reasonableness determinations. The DoD cadre of experts is identified at PGI 215.404-2(a)(iii).

12. Amend section 215.408 by—

- a. In paragraph (3)(i)(A)(1), removing “FAR 52.215-20, Requirement for” and adding “DFARS 252.215-70XX, Requirements for Certified Cost or Pricing Data and” in its place;
- b. In paragraph (3)(i)(A)(2), removing “FAR 52.215-20” and adding “DFARS 252.215-70XX” in its place;
- c. Revising paragraph (3)(i)(B);
- d. Redesignating paragraphs (4)(i), (4)(ii), and (5) as paragraphs (4)(i), (4)(ii), and (5), respectively; and
- e. Adding paragraph (6).

The revisions and addition read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) * * *

(i)(A) * * *

(B) Do not use 252.225-7003 in lieu of DFARS 252.215-70XX in competitive acquisitions; and

* * * * *

(6) When reasonably certain that the submission of certified cost or pricing data or data other than certified cost or pricing data will be required—

(i) Use the basic or alternate of the provision at 252.215-70XX, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in lieu of the provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(A) Use the basic provision when submission of certified cost or pricing data is required to be in the FAR Table 15-2 format, or if it is anticipated, at the time of solicitation, that the submission of certified cost or pricing data may not be required.

(B) Use the alternate I provision to specify a format for certified cost or pricing data other than the format required by FAR Table 15-2;

(ii) Use the provision at 252.215-70YY, Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor, when using the basic or alternate

of the provision at 252.215-70XX and copies of the proposal are to be sent to the ACO and contract auditor; and

(iii) Use the provision at 252.215-70ZZ, Requirements for Submission of Proposals via Electronic Media, when using the basic or alternate of the provision at 252.215-70XX and submission via electronic media is required.

PART 234-MAJOR SYSTEM ACQUISITION

13. Amend section 234.7002 by-

- a. In paragraph (a)(1)(i)(B), removing ";" and adding "; and" in its place;
- b. Removing paragraph (a)(1)(ii);
- c. Redesignating paragraph (a)(1)(iii) as paragraph (a)(1)(ii);
- d. In paragraph (b), removing "may" and adding "shall" in its place, and removing "only if-" and adding "if-" in its place;
- e. Revising paragraph (b)(2); and
- f. In paragraph (c)(1), removing "only if-" and adding "if-" in its place;
- g. Revising paragraph (c)(1)(ii); and
- h. Revising paragraph (d).

The revisions read as follows:

234.7002 Policy.

* * * * *

(b) * * *

- (2) The contracting officer determines in writing that

the subsystem is a commercial item.

(c) * * *

(1) * * *

(ii) The contracting officer determines in writing that the component or spare part is a commercial item.

* * * * *

(d) Relevant information. This section implements 10 U.S.C. 2379.

(1) To the extent necessary to make a determination of price reasonableness, the contracting officer shall require the offeror to submit prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers.

(2) If the contracting officer determines that the offeror cannot provide sufficient information described in paragraph (d) (1) of this section to determine the reasonableness of price, the contracting officer shall request the offeror to submit information on—

(i) Prices paid for the same or similar items under different terms and conditions;

(ii) Prices paid for similar levels of work or effort on related products or services;

(iii) Prices paid for alternative solutions or approaches; and

(iv) Other relevant information that can serve as the basis for a price reasonableness determination.

(3) If the contracting officer determines that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price, the contracting officer may request the offeror to submit other relevant information, including uncertified cost data. However, no uncertified cost data may be required in any case in which there are sufficient non-government sales of the same item to establish reasonableness of price.

(4) An offeror shall not be required to submit information described in paragraph (d)(3) of this section with regard to a commercially available off-the-shelf item. An offeror may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

14. Revise section 239.101 to read as follows:

239.101 Policy.

(1) A contracting officer may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items

unless the head of the contracting activity determines in writing that no commercial items are suitable to meet the agency's needs, as determined through the use of market research appropriate to the circumstances (see FAR 10.001(a)(3)) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

(2) See subpart 208.74 when acquiring commercial software or software maintenance.

(3) See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

PART 252—ACQUISITION OF INFORMATION TECHNOLOGY

15. Add section 252.215-70XX to read as follows:

252.215-70XX Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

Basic. As prescribed in 215.408(6)(i) and (6)(i)(A), use the following provision:

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN
CERTIFIED COST OR PRICING DATA—BASIC (DATE)

(a) Definitions. As used in this provision—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Nongovernment sales means sales of the supplies or services to nongovernmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient nongovernment sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b) (2) (ii) (B).

Uncertified cost data means the subset of "data other than certified cost or pricing data" (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data. (1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in the paragraphs (b) (1) (i) and (ii) of this section. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) Exception for prices set by law or regulation.
Identification of the law or regulation establishing the prices

offered. If the prices are controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract and military department, defense agency, or other DoD component that rendered such determination;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) Either of the following two statements included in the proposal:

(i) "The catalog pricing provided with this proposal is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer."; or

(ii) "The catalog pricing provided with this proposal is not consistent with all relevant sales data, due to the following: [Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)]."

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit the Department of Defense to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before

award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror shall prepare and submit certified cost or pricing data and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-2 are incorporated as a mandatory format to be used in any resulting contract, unless the Contracting Officer and the Offeror agree to a different format and change this provision to use Alternate I.

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(d) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and

reasonable, to include the requirements in DFARS 215.402(a)(i) and DFARS 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation.

(i) Offerors shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(e) Subcontracts. The Offeror shall insert the substance of this provision, including this paragraph (e), in subcontracts exceeding the simplified acquisition threshold defined in FAR part 2. The Offeror shall require prospective subcontractors to adhere to the requirements of—

(1) Paragraphs (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and

(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(End of provision)

Alternate I. As prescribed in 215.408(6)(i) and (6)(i)(B), use the following provision, which includes a different paragraph (c)(1).

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN
CERTIFIED COST OR PRICING DATA—ALTERNATE I (DATE)

(a) Definitions. As used in this provision—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Nongovernment sales means sales of the supplies or services to nongovernmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient nongovernment sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b) (2) (ii) (B).

Uncertified cost data means the subset of "data other than certified cost or pricing data" (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in the following paragraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) Exception for price set by law or regulation.

Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract and military department, defense agency, or other DoD component that rendered such determination;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) Either of the following two statements included in the proposal:

(i) "The catalog pricing provided with this proposal is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer."; or

(ii) "The catalog pricing provided with this proposal is not consistent with all relevant sales data, due to the following: [Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)].";

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit the Department of Defense to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in the following format: [Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.408, Table 15-2, Note 2. The Contracting Officer shall insert the description at the time of issuing the solicitation or specify that the format regularly maintained by the

offeror or prospective subcontractor in its business operations will be acceptable. The Contracting Officer may amend the description as the result of negotiations].

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(d) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and DFARS 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-63].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation. (i) Offerors shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(e) Subcontracts. The Offeror shall insert the substance of this provision, including this paragraph (e), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part

2. The Offeror shall require prospective subcontractors to adhere to the requirements of—

(1) Paragraph (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and

(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(End of provision)

16. Add section 252.215-70YY to read as follows:

252.215-70YY Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor.

As prescribed in 215.408(6)(ii), use the following provision:

REQUIREMENTS FOR SUBMISSION OF PROPOSALS TO THE ADMINISTRATIVE
CONTRACTING OFFICER AND CONTRACT AUDITOR (DATE)

When the proposal is submitted, the Offeror shall also submit one copy each to—

- (a) The Administrative Contracting Officer; and
- (b) The Contract Auditor.

(End of provision)

17. Add section 252.215-70ZZ to read as follows:

252.215-70ZZ Requirements for Submission of Proposals via Electronic Media.

As prescribed in 215.408(6)(iii), use the following provision:

REQUIREMENTS FOR SUBMISSION OF PROPOSALS VIA ELECTRONIC MEDIA

(DATE)

The Offeror shall submit the cost portion of the proposal via the following electronic media: [Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.].

(End of provision)

[FR Doc. 2016-18704 Filed: 8/10/2016 8:45 am; Publication Date: 8/11/2016]